



The Cooperation Council for the Arab States of the Gulf
Secretariat General

Secretary - General's Office

Steven Crocker
Chairman of Board
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Dear Mr. Steven Crocker:

Greetings from the Secretariat General of the Gulf Cooperation Council.

First of all I would like to appreciate ICANN and its efforts to develop the Domain Name ecosystem and its efforts in providing opportunities to various stakeholders to expand on the DNS system and innovative in the best interest of Internet users. The new gTLD program has been an important and debatable subject and we recognize the challenges and opportunities involved to all stakeholders.

The Gulf Cooperation Council (“GCC”) writes to respectfully request that the Board of the Internet Corporation for Assigned Names and Numbers (“ICANN”) reconsider its decision that “further consideration and analysis of the Final Declaration is needed” in connection with the *GCC v. ICANN* case, and its direction to the President and CEO, or his designee(s), “to conduct or cause to be conducted a further analysis of the Panel’s factual premises and conclusions.”¹

After two long years and great expense, the GCC not only prevailed in the Independent Review Process (“IRP”), but the decision of the three arbitrators (the “Panel”) was unequivocal and unanimous.² ICANN’s summary rejection of the outcome of a fair, neutral and independent process *designed by ICANN itself* is an

¹ See ICANN Adopted Board Resolutions (Mar. 16, 2017), available at <https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.b> (the “ICANN Resolution”).

² See *GCC v. ICANN*, Partial Final Declaration of the Independent Review Process Panel (Oct. 19, 2016) (the “Final Declaration”).



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egregious violation of ICANN's accountability obligations by which it purports to abide.³

It is telling that, after two years of the GCC alleging that ICANN's accountability mechanisms ring hollow, ICANN's Board now questions a thorough decision made after exhaustive briefing and oral argument by three universally-renowned arbitrators, who participated in an independent process designed to produce impartial, reasoned outcomes.⁴ During the Panel process, ICANN's counsel insisted that ICANN's main criterion for selecting arbitrators was that they be internationally respected and well-known. It took the parties over nine months to *mutually agree* on the arbitrators, whom it would be difficult to dispute are among the most recognized and respected arbitrators in the world.

Yet, just as ICANN selectively interpreted rules to gain an advantage during the IRP—which the GCC called out, and ICANN repeatedly denied—ICANN continues to prove its modus operandi by unilaterally creating new rules, deciding when and how existing rules should be enforced and demanding unfettered discretion in its decision-making.

The simple fact is that every single issue identified by the ICANN Resolution has already been argued and debated at great length in the nine briefs submitted by the parties between December 2014 and April 2016, and the Panel that made the ultimate determination already considered these issues in meticulous detail, not just by reviewing the nine written submissions, but also in holding a three-hour oral argument in July 2016 during which the ICANN Board was not present. In oral argument, the Panel clearly demonstrated that the three arbitrators had thoroughly reviewed the parties' written submissions, and asked thoughtful,

³ See, e.g. Article 3, Section 3.1 of the ICANN By-laws (Oct. 1, 2016), available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

⁴ The GCC disagrees that the Final Declaration is non-binding and reserves its right to argue, claim and dispute at any time that ICANN has an obligation to abide by the findings of the Final Declaration.



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probing questions. For the ICANN Board to now second guess not one or two but *three* internationally-respected arbitrators, who reviewed voluminous written submissions by the parties totaling hundreds of pages is self-serving and a blatant conflict of interest.

In fact, not only was the Panel uniformly convinced of ICANN's violations, but the Emergency Arbitrator, in a separate arbitral proceeding, found that, "[b]ased on a careful review of the Bylaws and the evidence, there are in my view a number of *serious questions about the process of the Board's decision making* and for which the Claimant has a reasonable possibility of establishing that the Board, or the NGPC has not met the Bylaw requirements in its decision making process." ⁵

The ICANN Board's uninformed assertion that the Panel "may have based its findings and recommendation on what may be unsupported conclusions and/or incorrect factual premises, and may not have given due consideration to the Board's consideration of facts and materials relevant to the GCC's concerns" is contrary to virtually every written submission made by the parties and the extensive oral arguments that took place in front of the Panel.⁶ The ICANN Board cannot now cherry-pick certain issues and isolate them as a basis to "reconsider" a fairly-won outcome for the GCC.

The GCC submits that it is a waste of time and resources—and profoundly unfair—to relitigate the arguments made by the parties that were thoroughly debated, argued and weighed by mutually-selected arbitrators, who issued an exhaustive written opinion after a full and fair process conducted under ICANN's own rules. Further, the ICANN Resolution cryptically notes that the ICANN Board needs more information to assess next steps, but gives no indication what the process is to obtain such information, how the ICANN Board will receive that

⁵ See *GCC v. ICANN*, Interim Declaration of Emergency Request for Interim Measures of Protection ¶ 88 (Feb. 12, 2015) (emphasis added) (the "Interim Declaration").

⁶ ICANN Resolution.



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information, what such information will convey, and what the ICANN Board will do with such information. The ICANN Board's seemingly ad hoc process leaves the GCC completely in the dark.

In order to educate the ICANN Board and the Organizational Effectiveness Committee of the ICANN Board further about the facts that were considered, we have submitted below a brief summary to counter the one-sided account in the ICANN Resolution. The statements made below are without prejudice to any claim, argument, defense or other rights available to the GCC in this forum or in any other forum. Further, the GCC reserves the right to make further statements about this matter at any time and in any forum.

ICANN Board's one-sided account of the Panel's Final Declaration

The ICANN Resolution states:

“The Panel may not have given due consideration to the Board's awareness of, and sensitivity to, the GCC's concerns, which were communicated through letters from the objecting countries and the GAC Early Warning in 2012, and the Board's response to the GAC's Beijing Communique accepting the GACs request for additional time to consider several applications, including the .PERSIANGULF application. The Board was also aware of and considered the following facts that: (i) the Independent Objector reviewed the GCC's concerns and found that he has no basis to object to the Application; (ii) the ICC-appointed expert reviewed and rejected the GCC's Community Objection; and (iii) the consensus objection advice regarding the Application.”⁷

⁷ ICANN Resolution.



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The ICANN Resolution, which selectively summarizes what the Panel “may not have given due consideration” reflects the very reason why the ICANN Board should not second guess the Panel that culled through hundreds of pages of documents, conducted several hours of oral argument, and spent countless hours independently analyzing the parties’ arguments. Not only did the parties repeatedly argue facts and circumstances around each of the above-mentioned factors, but even had they not, the ICANN Resolution makes no logical sense.

The GCC respectfully inquires whether the ICANN Board reviewed the nine written submissions the Panel considered when drafting its Final Declaration of forty-five pages. The parties discussed the considerations identified by the ICANN Resolution at length in their written submission, and the Panel reviewed these submissions and conducted oral argument, asking numerous questions based on their careful review. For the ICANN Board to now baselessly decide that the Panel did not give “due consideration” to these factors, just because ICANN believes that they should have been weighted more in ICANN’s favor, would gut the very purpose of conducting an IRP in the first place. The Panel noted that the IRP was an “**independent** review of the contested Board action” and applied a *de novo* standard of review.⁸ The evidence identified by the ICANN Resolution was already presented to the Panel, and the Panel weighed these factors and decided in the GCC’s favor.

As explained more fully below and in our written submissions and oral argument, the ICANN Board violated its Bylaws and Articles and failed to properly follow its own Guidebook.

⁸ Final Declaration ¶ 93 (emphasis in original).



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ICANN's Board one-sided account of the Panel's Final Declaration

The ICANN Resolution states:

“even though the Panel references Module 3.1 of the Guidebook, the Panel may have disregarded the fact that the GAC *did not provide advice to the ICANN Board that required further inquiry or dialogue*. The Durban Communique was unequivocal that GAC ‘does not object’ to the Application proceeding. Similarly, the GAC Operating Principle 46 (Article XII) is clear that: ‘Advice from the GAC to the ICANN Board shall be communicated through the Chair.’ As such, GAC Meeting Minutes do not constitute GAC Advice. If the Board were to adopt the Panel’s recommendation, it would result in the Board treating the .PERSIANGULF application differently than every other application that was not the subject of GAC Advice pursuant to Module 3.1, which in and of itself would be a violation of ICANN’s Bylaws.”⁹

The ICANN Board once again cherry-picks facts and circumstances when convenient for its position. The Panel already found ICANN’s main defense to be “*unduly formalistic and simplistic*.”¹⁰ The ICANN Resolution makes a repetitive argument that the “GAC Meeting Minutes do not constitute GAC Advice”— a statement the Panel not only did not “disregard,” but considered and outright rejected in its Final Declaration, stating that “[it] cannot accept ICANN’s argument that the GAC may provide official advice to the Board only through a Communique.”¹¹

⁹ ICANN Resolution.

¹⁰ Final Declaration ¶ 126.

¹¹ ICANN Resolution; Final Declaration ¶ 132.



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The ICANN Resolution also states that “[a]dvice from the GAC to the ICANN Board shall be communicated through the Chair.”¹² Of course, the Panel already recognized this point, stating in its Final Declaration that “[t]he GAC chair *clearly* did not [follow GAC principles]” adding that “[i]f the GAC had properly relayed these serious concerns as formal advice to the ICANN Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board.”¹³

What the ICANN Resolution does *not* acknowledge is that the GAC had not reached a consensus . As the Panel’s Final Declaration states, it is “***undisputed, and we agree, that the GCC did not issue Consensus GAC Advice against the ‘.persiangulf’ application or suggest remediation,*** leaving only the second form of advice – the expression of **concerns**, meant to prompt interaction with the Board,”— a fact that was patently obvious to the GAC Meeting Chair in Durban, as was stated in the unrebutted testimony of the GCC’s representative, Abdulrahman Al Marzouqi.¹⁴ The ICANN Resolution conveniently omits those very facts, which illustrate that ICANN did not properly follow the Guidebook.¹⁵

Even if we pretend for a moment that “the GAC *did not provide advice to the ICANN Board that required further inquiry or dialogue,*”¹⁶ the ICANN Resolution fails to acknowledge what the GCC already successfully argued – that the ICANN Board must offer an explanation concerning how it arrived at its decision or how that decision complied with its Articles and Bylaws.

¹² ICANN Resolution.

¹³ Final Declaration ¶¶ 128, 129 (emphasis added).

¹⁴ Final Declaration ¶ 124.

¹⁵ The ICANN Resolution only notes that the GAC did not object to the .PERSIANGULF application proceeding, but whether the GAC did or did not object to the .PERSIANGULF string does not change the fact that there was no consensus. The ICANN Resolution ignores that ICANN violated its Bylaws by failing to follow the Guidebook procedures, in addition to its transparency obligations.

¹⁶ ICANN Resolution.



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In fact, there is even IRP precedent, finding that the ICANN Board violated its transparency obligations when it accepted GAC's advice without conducting an independent analysis or *providing the reason behind its ultimate decision*.¹⁷ ICANN must explain or give reasons for its activities and disclose the results in a transparent manner.

Indeed, while the Panel was "sympathetic to ICANN's argument that the Board cannot be expected to spell out considerations going to mission and core values in every resolution passed on every gTLD application," it nonetheless found ICANN's decision violative of the Bylaws:

"[O]ur finding is not based on inferences from the lack of discussion about mission and core values in the Board's 10 September 2013 decision to allow the '.persiangulf' application to proceed. As noted, there was **no** discussion of **any** factors whatsoever in that decision. This cannot be reconciled with the requirement in Article 1, Section 2, of the Bylaws that ICANN 'exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.'"¹⁸

Further illustrating that the parties already argued these issues and the GCC already prevailed on them, in the Panel process here, ICANN tried to unsuccessfully distinguish the DotConnectAfrica (DCA) decision referenced above. The Panel was unpersuaded: "Contrary to ICANN's attempt to distinguish the DotConnectAfrica case, we find that ICANN's transparency obligations arose here despite the absence of Consensus GAC Advice. ***Indeed, transparency and***

¹⁷ *DotConnectAfrica Trust v. ICANN*, ICDR Case No. #50 2013 001083, Final Declaration ¶ 81 (Jul. 9, 2015) (emphasis added).

¹⁸ Final Declaration ¶ 142 (emphasis in original).



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the related need to further due diligence were more compelling in this case, given the pending community Objection concerning a sensitive application.”¹⁹

ICANN’s double standards in “reconsidering” the Panel’s Final Declaration is perfectly illustrated as it takes a narrow and, in the Panel’s own words, “simplistic and formalistic” view of what is considered GAC Advice while expecting others to blindly accept that ICANN had considered a broad range of factors when determining to proceed with the .persiangulf application, without identifying those factors or explaining its rationale. ICANN cannot have it both ways – interpreting rules narrowly or broadly only when favorable to ICANN.

We are now in an unknown, unprecedented and non-transparent holding pattern. The ICANN Board has stated that “additional consideration” is needed and, even more alarmingly, that it is evaluating whether to accept “certain aspects of the Final Declaration while potentially rejecting other aspects of the Final Declaration.”²⁰ Not only is the ICANN Board cherry-picking facts and interpreting rules broadly or narrowly as it sees fit, but it now asserts that it may freely pick and choose the components of the Final Declaration it wants to accept. The ICANN Board yet again is in violation of its Bylaws and Articles through this reconsideration and reveals in the process that its own rules are only rules when ICANN wants them to be.

Despite the GCC’s request that the ICANN Board describe in detail the procedure it intends to follow to consider additional information pursuant to the Final

¹⁹ Final Declaration ¶ 140 (emphasis added).

²⁰ ICANN Resolution.



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Declaration, we have heard nothing but silence from ICANN's counsel. The GCC respectfully requests (1) additional, detailed information about the process of reconsideration, (2) an opportunity for the GCC to be meaningfully heard in this process moving forward and (3) the appointment of a neutral, objective arbitrator to evaluate the circumstances.

We expect to hear from ICANN about our request as soon as possible.

Sincerely,

Dr. Abdul Latif bin Rashid Al Zayani

Secretary General of the Gulf Cooperation Council

Cc: Eric Enson, Jones Day